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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
Promotion of Competitive Networks in)
Local Telecommunications Markets)
)
Wireless Communications Association)
International, Inc. Petition for)
Rulemaking to Amend Section 1.4000 of)
the Commission's Rules to Preempt)
Restrictions on Subscriber Premises)
Reception or Transmission Antennas)
Designed To Provide Fixed Wireless)
Services)
)
Cellular Telecommunications Industry)
Association Petition for Rule Making and)
Amendment of the Commission's Rules)
to Preempt State and Local Imposition of)
Discriminatory and/or Excessive Taxes)
and Assessments)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

WT Docket No. 99-217

CC Docket No. 96-98

COMMENTS OF
ICG TELECOM GROUP, INC.

ICG Telecom Group, Inc. ("ICG") hereby submits its comments in response
to the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding.¹

¹ Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999)

I. INTRODUCTION

ICG, based in Englewood, Colorado, is a leading competitive telecommunications provider, with significant facilities in Colorado, California, Ohio, Texas, and the southeastern United States. ICG offers high quality telecommunications services including local, long distance, enhanced telephony, and data communications to small and medium sized businesses. Additionally, through its nationwide data network with 236 points of presence, ICG offers network capabilities and services to Internet Services Providers (ISPs) throughout the United States.

As the largest, independent, competitive local exchange carrier ("CLEC"), at the end of the second quarter of the 1999 fiscal year, ICG had over 500,000 local dial tone lines in service offered via its network comprising 29 voice switches, 16 data switches, and over 4,400 fiber route miles.

A major element of ICG's business plan has been to offer its platform of services over its own network facilities. Accordingly, access to the public rights of way is imperative to the interconnection of ICG's customers and switching facilities. To date, ICG has public rights of way access agreements with 65 municipalities throughout the country. Consequently, ICG has first hand knowledge of the inequities and irregularities relating to the issues raised by the Commission in the NOI.

ICG is a member of the Association of Local Telecommunications Services ("ALTS"). ALTS is filing comments in these proceedings, and ICG supports and

incorporates by reference the positions advocated in those comments. With the instant comments, ICG supplements the record with additional information concerning ICG's experiences in obtaining municipal rights of way agreements. Based on ICG's first hand knowledge of the critical importance of fair and non-discriminatory access to public rights of way, ICG urges that all carriers be treated equally and fairly by all municipalities.

II. UNDER SECTION 253 (C) OF THE TELECOMMUNICATIONS ACT, LOCAL GOVERNMENTS MAY ONLY REQUIRE FAIR AND REASONABLE COMPENSATION FOR ACCESS TO THE PUBLIC RIGHTS OF WAY.

To deploy an ubiquitous and seamless telecommunications network, ICG, like other similarly situated wireline carriers, must provide facilities that (1) connect its customers within its serving area with ICG's points of presence/switching equipment; and (2) interconnect ICG's facilities with the facilities of other carriers. ICG, in some instances, accomplishes these connections by leasing facilities from an Incumbent Local Exchange Carrier ("ILEC"), and in other instances, by placing its own overhead and underground facilities in private or municipal rights of way.²

Placing facilities in municipal rights of way typically requires ICG, or its contractor, to obtain construction permits from the local department of public works, or city engineer's office. As a condition precedent to obtaining the required construction permit,

² Overhead facilities are typically installed on utility poles owned and maintained by the ILECs and regional and local electrical power companies.

most jurisdictions require that ICG and other new entrant telecommunications providers enter into rights of way access agreements.³

In ICG's experience, these access agreements often provide the new entrant very limited rights to construct in and occupy the public rights of way in exchange for exorbitant compensation that must be paid to the municipality. In many instances, these agreements are nothing more than a vehicle for extracting revenues that far exceed a municipality's reasonable administrative, legal, and other costs of managing its rights of way.

For example, in Denver, Colorado, the Denver City Council passed an ordinance that would have required all telecommunications providers to pay either an average of \$1.56 per foot for facilities located in the public rights of way, or alternatively, "5% of the gross revenues of the permittee from the provision of telecommunications services within the City."⁴ In ICG's view it is hard to reconcile a fee requirement that is based on a percentage of a carrier's revenues with the Act's requirement that right of way fees be "fair and reasonable." Are the City's costs somehow increased if a carrier is successful in marketing its services in a particular year? Is the impact on the rights of way somehow greater if the carrier has had a successful year?

³ Right of way agreement is a generic term of art, but refers to any number of actual types of agreements such as easements, encroachment agreements and license agreements.

⁴ Denver Revised Municipal Code, Section 10.5 (1997).

This Commission also should be aware that the actions of the Denver City Council in passing the above-described ordinance was in direct contradiction to the statutory limitations placed on municipalities by the Colorado legislature. In 1996, the Colorado General Assembly passed Senate Bill 96-10, which requires municipalities to reasonably relate any rights of way access fees to the direct costs incurred for the administration of the rights of way.⁵ Again, a revenue based right of way fee clearly cannot be found to be reasonably related to the direct costs of administering the rights of way.⁶ In fact, City officials admitted under oath that the City never calculated the direct cost associated with the administration of the rights of way, and therefore, clearly did not take such costs into account when establishing the rights of way ordinance. Rather, the City has acknowledged the ordinance's requirement for payment of 5% of revenues from each telecommunications provider simply represented an unsubstantiated fair market rental value for access to the public rights of way.

Because the City of Denver's ordinance failed to comply with the Act or Colorado law, ICG, and other telecommunications providers were forced to undertake the substantial legal expense of filing a legal complaint against the City of Denver. The providers prevailed at trial, but the case is currently on appeal at the Colorado Supreme Court.⁷ While ICG is

⁵ COLO. REV. STAT. § 38.5-107 (1996).

⁶ Typically, "direct costs of administering the rights-of-way" include costs associated with inspection, engineering, insurance, traffic management and utilities locating.

⁷ U.S. West et al. v. City of County of Denver, CV No. 98CV691 (Notice of Appeal filed July 8, 1999).

encouraged that the judicial process is able to enforce state and federal statutory requirements that fail to meet such standards, it is unfortunate that carriers must spend their resources on litigation in order to ensure that municipalities will act in a fair and reasonable manner.

ICG has encountered numerous other situations where municipalities seemingly have failed to treat providers fairly and impartially. For example, ICG had no practical choice but to enter into a franchise agreement with the City of San Antonio that requires payment of \$.96 per residential line and \$3.28 per business line (\$35,000 guaranteed minimum per year), as well as a requirement that ICG “provide customer premises equipment as necessary to implement video conferencing capabilities” at three municipal locations. The agreement further states that “[t]he total cost of such equipment shall not exceed two hundred thousand (\$200,000).” In the NOI, the Commission noted, at page 42, its “concern about requirements imposed on carriers that use the public rights-of-way that are unrelated to their rights-of-way usage.” The City’s demand for video conferencing equipment is an example of a requirement that, in ICG’s view, has no rational relationship to the City’s regulation of the rights of way.

The overreaching actions of other Texas municipalities in the franchise arena are demonstrated by the lawsuits brought by telecommunications providers against the City of

Dallas⁸ and the City of Austin.⁹ Additionally, the Texas legislature recently passed a bill that requires the Texas Public Utility Commission, rather than each individual municipality, to determine franchise fees payments to be paid to a particular municipality. While the calculation of franchise fees by a State regulatory commission potentially may limit a municipality's ability to unreasonably discriminate between carriers, the Texas legislation continues to be of concern because it does not require that the fees paid by a carrier be reasonably related to the administrative costs of the rights of way. As demonstrated herein, a requirement that rights of way fees be cost-based is essential to keeping these skyrocketing fees at a reasonable level.

III. MUNICIPALITIES MUST PROVIDE ACCESS TO THE PUBLIC RIGHTS OF A WAY ON A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY BASIS.

In addition to the unreasonable compensation often demanded by municipalities for access to their rights of way, some municipalities are also unwilling to provide access on a nondiscriminatory, competitively neutral basis. As an example, ICG's experience with the City of Palo Alto, California illustrates how a city can delay a new entrant's entry into the market by subjective, time delaying requirements while at the same time allowing incumbent carriers unhindered access to the City's rights of way.

⁸ See AT&T Communications of the Southwest, Inc., et al. v. City of Dallas, 8 F.Supp 2d (N.D. Tex. 1998).

⁹ See AT&T Communication of the Southwest, Inc. v. City of Austin, 975 F. Supp. 98 (W. D. Texas 1997).

In Palo Alto, ICG's network strategy required it to interconnect its facilities with the facilities of another non-affiliated CLEC that has facilities in the Palo Alto public rights of way. The interconnection required ICG to construct a small amount of its own facilities in the City's rights of way in order to complete the interconnection with the other CLEC. After complying with all of the City's pre-construction requirements,¹⁰ ICG was informed by the City that ICG's construction permits had been denied, simply because the other CLEC, with whom ICG was seeking to interconnect, had failed to obtain a right of way agreement during one of that CLEC's previous construction projects. In fact, a city official stated directly that the City was "holding ICG 'hostage'"¹¹ until the other CLEC agreed to enter into a rights of way agreement with the City.

Because the construction and interconnection was critical to ICG's business plan, ICG had no choice but to continue to negotiate with both the City and the other CLEC in order to reach a solution that was satisfactory to the City. The negotiations took seven months and amounted to thousands of dollars in unnecessary expense to ICG before the City agreed to issue construction permits to ICG. Again, the City's reasons for withholding the permits was not reasonably related to ICG's use of the rights of way and any impact on the city from that use. Rather, the city appeared to be pursuing an agenda unrelated to ICG. Moreover, during the seven month period during which ICG

¹⁰ Prior to construction in the public rights of way, most municipalities require the filing of engineering designs, construction drawings, traffic management plans and utility location and notifications plans.

negotiated with the City, the incumbent providers were free to construct facilities in the City's rights of way. ICG believes that the City's actions fly in the face of the Act.¹²

IV. MUNICIPALITIES HAVE BEGUN TO ENACT SCHEMES TO MAXIMIZE REVENUE UNDER THE PREMISE THAT THEY ARE REGULATING ACCESS TO THE PUBLIC RIGHTS OF WAY.

Without a requirement that rights of way fees be related to the municipalities' costs of regulating the rights of way and an accompanying means of enforcing such a requirement, ICG is concerned that municipalities might use the right of way process to obtain general revenues from the communications industry. In fact, ICG believes that certain cities are beginning to do just that.

An ordinance recently passed by the City of Dublin, Ohio permits one construction company, designated by the city, to build and manage all of the underground conduit in the public rights of way. Under the ordinance, the privately owned underground conduit will be installed in three phases. The initial pricing schedule indicates that telecommunications providers that seek to install their own facilities in the conduit will be required to pay an upfront one-time charge of anywhere from \$7.72 to \$21.00 per linear foot of facilities occupying the Dublin rights of way, which translates into a charge of

¹¹ ICG's permits were arbitrarily withheld until we could guarantee that the other CLEC would enter into a rights of way agreement with the City.

¹² The City's actions are also contrary to the 1998 decision of the California Public Utilities Commission which holds that while municipalities have the right to control the time, place and manner in which the rights of way are accessed by telecommunications providers, the "control to be reasonable, shall at a minimum be applied to all entities in an equivalent manner." In re Order Instituting Rulemaking on the Commission's Own (footnote continued on next page)

approximately \$250,000 for ICG.¹³ This one-time charge far exceeds what ICG has had to pay other cities for access to similar rights of way. In addition to the up-front charge, the ordinance assesses an annual recurring fee of \$3.67 per linear foot for facilities, which is much higher than the typical municipal fee, (which, in ICG's experience, ranges from \$.40 to \$1.00 per linear foot of facilities occupying the right of way).

Moreover, telecommunications providers do not have an option of whether they want to participate in the Dublin program. Any construction permit application (whether to install new facilities or access existing facilities previously installed by a telecommunications provider) submitted to the City triggers the requirement that the provider pay the up-front fee and the annual fee in order to obtain the permit.

Like the City of Denver ordinance discussed above, the City of Dublin ordinance also raises issues under both Section 253 (c) of the Act and applicable state law. In June 1999, the Ohio legislature passed new legislation that prohibits municipalities from levying a tax, fee, or charge for the privilege of occupying the public rights of way. While the legislation permits a city to charge a construction permit fee, any such fee must be limited to the recovery of "direct incremental costs incurred by [a city] in inspecting, and reviewing plans and specifications, and in granting the ...permit."¹⁴ Despite the clear parameters set

Motion into Competition for Local Exchange Service, Decision 98-10-058, October 22, 1998.

¹³ City of Dublin Right of Way Regulations, March 26, 1999.

¹⁴ OHIO REV. CODE § 4939.03 (1999).

forth in the new law, the City of Dublin is seeking to impose one-time and recurring charges for access to its rights of way that clearly exceed the direct incremental costs incurred by the city for administration of the rights of way.

Furthermore, the City of Dublin is taking extraordinary measures to force providers to comply with its legally questionable and unreasonable requirements. Recently, when ICG refused to remove overhead facilities that were legally attached to a utility company's poles located along a major Dublin thoroughfare, the City removed ICG's facilities without ICG's permission and is maintaining that ICG must move its facilities into underground conduit and then pay the requisite up-front fees. ICG believes the Dublin program and the City's unjustifiable actions pursuant thereto, are evidence of the need for this Commission to act now to ensure that such practices will not be tolerated.

V. CONCLUSION.

ICG believes that the examples discussed above clearly indicate the need for the Commission's active involvement in this important matter. Without the Commission's presence, many municipalities will continue to take actions that frustrate the development of competition in the local telecommunications market.

Furthermore, ICG submits that effective oversight by this Commission, as well as mechanisms to bring franchise fee issues before the Commission for quick and effective review, is essential to ensuring the existence of competition in the local telecommunications market.

Finally, ICG endorses the comments filed by ALTS, and agrees that the Commission should articulate and adopt, in a declaratory ruling, the principles stated in the ALTS filing.

Respectfully submitted,
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